RECORD AND BRIEFS

Supreme Court, U.S.
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Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

CHRISTOPHER G. WINTER
CRAG LAW CENTER
917 S.W. Oak Street
Suite 417
Portland, OR 97205
(503) 525-2725

PAUL A. KAMPMEIER
Counsel of Record
WASH. FOREST LAW CTR.
615 Second Ave., Ste. 360
Seattle, WA 98104
(206) 223-4088
pkampmeier@wflc.org

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Respondent

Date: June 2012

RULE 29.6 STATEMENT

The statement in the Respondent's Brief in Opposition remains accurate.

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INTRODUCTION

The amicus curiae brief of the United States correctly argues that this Court should deny the petitions for writs of certiorari. *See* U.S. Br. at 1, 8, 11, 14, 20, 21. Specifically, the United States agrees with Respondent Northwest Environmental Defense Center (NEDC) that the court of appeals' interpretation of the Clean Water Act rules at issue does not conflict with decisions of other circuits or of this Court. As the United States points out, no other court has addressed whether the Environmental Protection Agency's Phase I stormwater regulation requires National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges from pipes, ditches and channels along logging roads. The United States also agrees with NEDC that the court of appeals had the power to interpret EPA's rules as it did and that the court did not expressly or implicitly invalidate any rule in contravention of section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2). Although the United States contends that the court of appeals erred by not deferring to EPA's interpretation of the applicable regulations, the United States also acknowledges that its claimed error does not warrant review by this Court. Finally, the United States agrees with NEDC that the petitions do not present questions of great practical importance that warrant this Court's attention.

I. The court of appeals' decision does not conflict with decisions of other circuits or of this Court.

In this Clean Water Act citizen suit, the court of appeals held that NEDC's complaint stated a claim

for relief by alleging that the petitioners must comply with EPA's Phase I stormwater regulation, 40 C.F.R. § 122.26, which requires NPDES permits for stormwater discharges associated with the logging industry. The court further held that another regulation, the so-called silvicultural rule, 40 C.F.R. § 122.27, does not exclude stormwater discharged from pipes and ditches along active logging roads from the Phase I rule or otherwise redefine those discharges as nonpoint-source pollution that is exempt from the NPDES permit requirement. With its filing in this Court, the United States confirms that these narrow issues of regulatory construction do not warrant review. U.S. Br. at 1, 8, 11, 14, 20, 21.

1. As the United States explains, the court of appeals' regulatory interpretations do not conflict with any other decision because "[t]he court below is the first court of appeals to address whether EPA's Phase I industrial stormwater regulation, 40 C.F.R. § 122.26(b)(14), requires permits for the type of discharges at issue." U.S. Br. at 15 (citing NEDC Opp. Br. at 15-16). The United States' brief confirms NEDC's position that the court of appeals' decision does not conflict with either *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998), or *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 3381 (2005). U.S. Br. at 15-16; *and see* NEDC Opp. Br. at 16-18.

Nor have the courts issued conflicting interpretations of the silvicultural rule. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding that 40 C.F.R. § 122.27 is not an NPDES exemption for point-source pesticide dis-

charges associated with forestlands); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*, 278 F. Supp. 2d 654 (E.D.N.C. 2003) (holding that 40 C.F.R. § 122.27 is not an NPDES permit exemption for stormwater drainage ditches associated with forestlands); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, No. 01-2821, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) (holding that 40 C.F.R. § 122.27 does not exempt stormwater drainage ditches associated with forestlands from the NPDES permit requirement); *and see also Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) (holding that discharges of collected and channeled stormwater associated with timber harvest are subject to the NPDES permit requirement).

2. The United States also agrees with NEDC that the court of appeals' decision does not conflict with any cases decided under section 509(b) of the Act, 33 U.S.C. § 1369(b), because the court of appeals did not expressly or implicitly invalidate any EPA rule. U.S. Br. at 7, 8-11, 14-15. The United States correctly states that "Section 1369(b)(2) did not preclude the courts below from exercising jurisdiction over this citizen suit." U.S. Br. at 9 (citation omitted).

Specifically, the United States explains that:

> Contrary to petitioners' contention, * * * the court of appeals did not expressly or implicitly invalidate either the Silvicultural Rule or the EPA regulation that defines the term "stormwater discharge associated with industrial activity." Rather, the court of appeals simply interpreted those regulations in a manner different from the construction advanced in the government's amicus brief. * * * [J]ust as a court does not invalidate a statute by construing it to avoid

> perceived constitutional difficulties, the court of appeals did not invalidate the Silvicultural Rule by adopting the interpretation that the court viewed as necessary to achieve compliance with the governing statute. * * * And because EPA did not announce its official reading of the Silvicultural Rule at the time of the rule's promulgation, respondent could not reasonably have been expected to challenge that potential reading under Section 1369(b)(1) at that time.

U.S. Br. at 9-10 (citing *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 581 (2007)) (other citations omitted); *see also* U.S. Br. at 14-15. The United States' agreement that the court of appeals' reading of the rules is a permissible construction of their terms definitively lays to rest petitioners' section 509(b) arguments and confirms that NEDC did not challenge, and the court of appeals did not strike down, any rule. NEDC Opp. Br. at 19-26. "Further review of this issue is not warranted." U.S. Br. at 11.

3. Although the United States asserts that the court of appeals erred by refusing to defer to EPA's interpretation of the NPDES rules, U.S. Br. at 11-14, it acknowledges that its alleged error—which involves only the application of settled principles of law to the regulations at issue and presents no conflict with any other judicial decision—does not warrant review by this Court. U.S. Br. at 8 ("On the merits, the court erred in failing to give appropriate deference to EPA's interpretation of its own regulations. That error, however, does not warrant this Court's review."). NEDC agrees that there would be no reason to review the court of appeals' application of correctly stated rules of law to the interpretation of

EPA's regulations, even if, as the United States contends, the court of appeals reached an incorrect result.

4. Review is also unnecessary because the court of appeals did not err in applying this Court's deference precedents. EPA's interpretation of the silvicultural rule is not entitled to deference, under *Chevron* or *Auer*, because EPA's construction would place the rule in conflict with the plain language of the Act and there is an alternative reading of the rule that is consistent both with the Act's clear terms and the regulation's own language.

The United States notes that EPA, in the amicus briefs it filed below, construed the silvicultural rule to mean that "all precipitation-driven runoff from logging roads is excluded from NPDES permitting requirements even if it flows through a ditch, channel or culvert before being discharged into navigable waters." U.S. Br. at 5. The United States attempts to justify EPA's interpretation of the silvicultural rule by claiming that the term "discrete conveyance" in the statutory definition of "point source" leaves room for some "exclusion by interpretation." U.S. Br. at 12 (citing *Nat. Res. Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977)). But while EPA may have some room to interpret and further define the term "point source," EPA does not have the power to *redefine* pipes, ditches and channels as nonpoint sources because the statute specifically defines those conveyances as "point sources." *Costle*, 568 F.2d at 1377, 1382; *Forsgren*, 309 F.3d at 1190; 33 U.S.C. § 1362(14).

The court of appeals correctly noted that a court reviewing an agency's construction of a statute must

first determine whether Congress has directly spoken to the precise question at issue. State Pet. App. 10-11 (citing, *inter alia*, *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 842-43 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. The court of appeals also correctly noted that NEDC alleged that the discharges at issue are from pipes, ditches and channels and that the Act specifically defines those conveyances as "point sources." State Pet. App. 5-7, 11, 13. By specifically providing that the term "discrete conveyance" includes at a minimum any pipe, ditch or channel, Congress unambiguously defined pipes, ditches and channels as "discernible, confined and discrete conveyances" and foreclosed EPA's ability to redefine them as nonpoint sources. *Costle*, 568 F.2d at 1377, 1382; *Forsgren*, 309 F.3d at 1185-86, 1188 n.6, 1190. **Indeed, the case that the United States relies upon addresses stormwater discharges associated with silvicultural activities and clearly states that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of §402."** *Costle*, 568 F.2d at 1377; *and see* U.S. Br. at 12.

Because the CWA unambiguously defines pipes, ditches, and channels as discernible, confined and discrete conveyances—as "point sources"—EPA does not have the power to construe the terms "discrete conveyance" in a manner that redefines pipes, ditches and channels as nonpoint sources. The court of appeals did not err by refusing to afford *Chevron* or

Auer deference to an interpretation of the silvicultural rule that would violate the statute when, as the United States concedes, the alternative construction adopted by the court is a permissible reading of the regulation's language.

5. Nor did the court of appeals err by refusing to defer to EPA's interpretation of the Phase I stormwater rule. The United States agrees that the Phase I rule lists Standard Industrial Classification (SIC) 2411 ("Logging") as an "industrial activity" that requires NPDES permits for stormwater discharges. U.S. Br. at 13. The United States nonetheless argues that the court of appeals should have afforded *Auer* deference to EPA's contention that the Phase I regulation only requires NPDES permits for stormwater discharges associated with "traditional industrial sources such as sawmills" or for discharges from "the four categories of silvicultural facilities" that EPA had already defined as point sources in the silvicultural rule. U.S. Br. at 13-14.

As an initial matter, sawmills are in an entirely different SIC category from logging. Sawmills are in SIC 2421 (entitled "Sawmills and Planing Mills, General"). *See* ER 47 at 93.[1] By regulating SIC 2411 (logging) *and* SIC 2421 (sawmills), EPA demonstrated its intent to regulate *both*. EPA's contrary positions are not entitled to deference because they are flatly inconsistent with the text of the Phase I rule. *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

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[1] ER refers to the Appellant's Excerpts of Record on file with the court of appeals. They are cited as "ER [document number] at [excerpts of record page number]."

According to the SIC Manual, SIC 2411 includes "[e]stablishments primarily engaged *in cutting timber* and in producing ... primary forest or wood raw materials ... *in the field*." ER 47 at 93 (emphasis added). EPA also clearly states in the preamble to the rule that "EPA intends that the list of applicable SICs will define and identify what industrial facilities are required to apply." 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990). The Phase I rule also states:

> For the categories of industries identified in this section, the term [stormwater discharge associated with industrial activity] includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; [and] material handling sites * * *.

40 C.F.R. § 122.26(b)(14). As is evident from the list of "associated" discharges, "industrial plant yards" are just one of the locations regulated by EPA's rule. *See also* 55 Fed. Reg. at 48007 (noting that EPA was "supplementing" the "at an industrial plant" language "with a description *of various types of areas that are directly related to an industrial process* (e.g., industrial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites...)") (emphasis added).

The Phase I rule does not say that "NPDES permits are required for traditional industrial sources such as sawmills." Nor does it say that "NPDES permits are required for stormwater discharges from the four silvicultural point sources listed in 40 C.F.R. § 122.27." Rather, by including SIC 2411 on the

Phase I list EPA required permits for stormwater discharges associated with industrial "logging" (cutting timber), including discharges along "immediate access roads . . . used . . . by carriers of raw materials." *See* NEDC Opp. Br. at 7-10, 28-29. EPA's far narrower interpretation of its rule is not entitled to deference because it is plainly inconsistent with the text of the regulation. *Auer*, 519 U.S. at 461-62.

II. The court of appeals' decision does not present a question of great practical importance.

The United States also correctly explains that the petitions do not present questions of great practical importance that require this Court's attention. In response to the petitioners' claims that the court of appeals' decision warrants review because it threatens to impose significant compliance burdens on regulators and the timber industry, the United States notes that both Congress and EPA have taken steps to mitigate petitioners' concerns. U.S. Br. at 16-20.

NEDC agrees with the United States that EPA's public rulemaking process (for which the congressionally enacted temporary permitting moratorium has allowed some breathing room) is the appropriate venue for addressing practical concerns related to EPA's regulation of point-source stormwater discharges along logging roads. U.S. Br. at 17-18. Although the industry petitioners complain that NPDES permit development "often takes years" and is subject to administrative and judicial challenge, EPA has, without challenge, made the Multi-Sector General Permit available for owners and operators wishing to obtain coverage in EPA jurisdictions. U.S. Br. at 20. EPA's action in this regard is consistent

with the Ninth Circuit's guidance that a general permitting program can be used and that "the permitting process is not necessarily onerous." State Pet. App. at 51. Individual NPDES permits are also available in states with authorized NPDES programs.

In any event, in light of EPA's initiation of rulemaking to address stormwater discharges from logging roads, it is uncertain at this point whether EPA will even require permits for those pollution sources. The outcome of that rulemaking is at this point unknown and whatever legal issues it may present are matters to be addressed when it is completed. For now, however, the supposed burdens of NPDES permits are speculative and best addressed through the ongoing regulatory processes. Congress explicitly delegated to EPA and the states the authority and responsibility to develop stormwater discharge regulations and appropriate NPDES permitting programs. Supreme Court review is not necessary where EPA has initiated the steps to do so and where the many states authorized to issue NPDES permits can relieve regulatory burdens by developing general or individual permits that address local concerns.

CONCLUSION

For the foregoing reasons, and for the reasons stated in NEDC's Brief in Opposition, the petitions for writs of certiorari should be denied.

Respectfully submitted,

PAUL A. KAMPMEIER
Counsel of Record
WASHINGTON FOREST LAW CENTER
615 Second Avenue
Suite 360
Seattle, WA 98104
(206) 223-4088 extension 4
pkampmeier@wflc.org

CHRISTOPHER G. WINTER
CRAG LAW CENTER
917 S.W. Oak Street
Suite 417
Portland, OR 97205
(503) 525-2725
chris@crag.org

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Respondent Northwest Environmental Defense Center

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